



**State of New Jersey**  
DIVISION OF THE RATEPAYER ADVOCATE  
31 CLINTON STREET, 11TH FLOOR  
P.O. BOX 46005  
NEWARK NJ 07101

DOCKET FILE COPY ORIGINAL

CHRISTINE TODD WHITMAN  
Governor

BLOSSOM A. PERETZ, ESQ.  
Ratepayer Advocate  
and Director

April 3, 1998

Secretary  
Federal Communications Commission  
1919 M Street NW, Room 222  
Washington, DC 20554

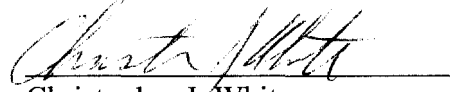
**Re: In the Matter of Petition of Bell Atlantic Corp. For Relief  
from Barriers To Deployment of Advanced Telecom. Servs.  
CC Docket No. 98-11**

Dear Secretary:

The Division of the Ratepayer Advocate (Ratepayer Advocate) hereby submits its comments as an interested party in the above referenced proceeding. An original and 13 copies are enclosed. Please add us to the service list for this proceedings and return a date stamped copy to me in the attached self addressed stamped envelope.

The State of New Jersey  
Division of the Ratepayer Advocate

Blossom A. Peretz  
Ratepayer Advocate

  
Christopher J. White  
Deputy Assistant Ratepayer Advocate  
31 Clinton Street, 11th Floor  
Newark, New Jersey 07101  
(973) 648-7575

No. of Copies rec'd 0+12  
List A B C D E

H:\FCC.CL April 3, 1998 (2:10pm)

**SERVICE LIST**

**COMMENTS FOR FILING  
DOCKET CC NO. 98-11**

Janice M. Myles  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, Rm. 544  
Washington, DC 20554

Richard J. Metzger  
Association for Local  
Telecommunications Services  
888 17th Street, NW  
Washington, DC 20006

Bell-Atlantic  
John Thorne  
1320 N. Courthouse Road, 8th Floor  
Arlington, VA 22201

MCI Telecommunications Corp.  
Kecia Boney  
1801 Pennsylvania Ave., NW  
Washington, DC 20006

William J. Rodney, Jr.  
10 Winthrop Square  
Boston, MA 02110


Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 98-11
Petition of Bell Atlantic Corporation	)	
for Relief from Barriers to Deployment	)	
of Advanced Telecommunications	)	
Services	)	

**DIVISION OF THE RATEPAYER ADVOCATE COMMENTS**

The State of New Jersey  
Division of the Ratepayer Advocate

Blossom A. Peretz  
Ratepayer Advocate



Christopher J. White  
Deputy Assistant Ratepayer Advocate  
31 Clinton Street, 11th Fl.  
Newark, New Jersey 07101  
(973) 648-7575

Dated: April 6, 1998

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	CC Docket No. 98-11
Petition of Bell Atlantic Corporation	)	
for Relief from Barriers to Deployment	)	
of Advanced Telecommunications	)	
Services	)	

**COMMENTS TO BELL ATLANTIC'S PETITION**

**INTRODUCTION**

The Division of the Ratepayer Advocate ("Ratepayer Advocate"), State of New Jersey, is a separate independent state agency established under N.J.S.A. 13:1-D-1 for the express purpose of protecting the interest of all classes of New Jersey consumers in all matters affecting public utilities. The Ratepayer Advocate represents broad ratepayer interests and is authorized to appear on their behalf in various matters that are before the New Jersey's Board of Public Utilities ("BPU"), a State commission as defined in the Communications Act of 1934, as amended. This includes matters associated with the implementation of the Telecommunications Act of 1996 ("Act" or "1996 Act"), 47 U.S.C. § 151 *et. seq.*

The Ratepayer Advocate strongly supports the Act and its intended benefits to all consumers of telecommunications services. The petition filed by Bell Atlantic Corporation ("BA") directly affects ratepayers and rights established under the Act, and the Ratepayer Advocate's mandate is within the zone of interest to be protected. The Ratepayer Advocate has previously participated in other Federal Communications Commission's ("FCC's") proceedings such as interconnection and Universal Service. The Ratepayer Advocate also will participate in any proceedings conducted by

the BPU in connection with Section 271 of the Act. In view of the foregoing, the Ratepayer Advocate is an interested party for purposes of submitting comments in this matter.

### **EXECUTIVE SUMMARY**

The Ratepayer Advocate on behalf of all consumers supports the benefits of expanded competition in telecommunications services in the local and long distance markets. Meaningful competition in both of these markets will give consumers more choices which in turn should lower prices for all consumers. Congress limited RBOCs entry into in-region interLATA services until meaningful competition exists in the local exchange market, as demonstrated by the RBOCs' compliance with the 14 point checklist set forth in Section 271(e)(2)(B) of the Act.

After review of BA's petition, the Ratepayer Advocate concludes the petition is not in the interest of all New Jersey's consumers because (1) the petition does not advance meaningful competition because it seeks in effect a limited waiver for BA to offer certain in-region interLATA services prior to BA's compliance with Section 271 of the Act; (2) the petition does not result in more choices for consumers and the prospect of lower prices because meaningful competition will still not exist in the local exchange market; (3) the petition is non specific and fails to give sufficient details in order to determine why this petition is in the best interest of consumers, let alone why BA's petition is in the public interest; and (4) the petition ignores the role of State commissions and appears to seek preemption of otherwise applicable statutory requirements, such as those that exist in New Jersey for the protection of New Jersey's consumers.

The Ratepayer Advocate wants the promise of the benefits offered to consumers under the Act to be realized so that expanded competition will exist in all markets, including local and long distance. As a result, the petition of BA should be denied and dismissed. BA's petition is contrary

to the Act and completely ignores State interests in the Federal system of telecom regulation that has been in practice for over six decades. In BA's petition, it requests relief from certain alleged restrictions impeding its expansion and offering of high-speed, packet-switched data services, including Internet, Intranet, and Extranet services in its in-region service area. BA seeks relief under § 706 of the Act. Specifically, BA is seeking permission to (1) provide high-speed broadband services in its in-region service area as well as its out-of-region service area; (2) develop its newer high-speed broadband services that operate at speeds greater than ISDN, including xDSL services, free from pricing, unbundling, and separations restrictions designed for voice calls; and (3) sell such newer high-speed broadband services outside otherwise applicable price cap and separate affiliates rules (collectively "Petitioned Services").

BA can not use Section 706 of the Act to override the expressed statutory provisions of Section 271 of the Act. Section 706 does not permit the FCC to alter the restrictions established under Section 271 of the Act. If properly implemented, Section 271 will benefit all consumers. Section 271 precludes BA, a Regional Bell Operating Company (RBOC), from offering in-region interLATA services in a state until it meets the requirements of Section 271 for the particular state in question. Section 271(c)(2)(B) of the Act conditions FCC's approval of a RBOC's application for in-region intraLATA service on the FCC determining that a 14 point checklist has been met. The FCC has made no determination regarding BA's compliance with Section 271 of the Act. As a result, BA's proposed use of Section 706 is misplaced.

In addition, BA has made no showing that the requested relief is appropriate, warranted, necessary or otherwise in the public interest. The public interest includes consideration of consumers' interest, but BA has not addressed consumers' interest in its petition. BA wants the

authority to provide the Petition Services as in-region service, i.e., the relaxation of restrictions imposed by Section 271 of the Act prior to its full compliance with Section 271. BA seeks such authority (1) without any BA commitment to have in place a specific or detailed plan for Petition Services including an implementation plan, (2) without BA demonstrating how its Petition Services in the first instance will further advance telecommunications, promote competition in the local telecommunications market, and remove barriers to infrastructure investment, and (3) without any support, other than BA's naked request, why the FCC should invoke one or more of the regulatory options set forth in Section 706 without a concrete and specific plan with consumer specific benefits identified.

Moreover, and in addition to its other infirmities, BA's petition, as proposed, fails to address and completely ignores the role and necessary involvement of State commissions pursuant to pertinent state laws. Advanced telecommunications services have interstate and intrastate components which are subject to independent federal and state regulation. BA fails even to address let alone resolve, the complex jurisdictional questions that are raised by its petition. The sweeping scope of BA's petition would apparently preempt all State authority with respect to the services at issue. Although Section 706(a) of the Act authorizes the FCC to exercise regulatory forbearance, that forbearance does not extend to matters that are within the jurisdiction of State commissions under applicable state laws. *See*, Sections 253, 261, and 252(e)(3) of the Act

BA in effect wants to have its cake and eat it too; that is, BA wants the FCC to agree in advance to relax federal regulatory controls and possibly state controls without knowing what BA intends to do if controls were relaxed, without assessment of the effects relaxation would have now and in the future on the competitiveness of the local exchange market, and without making a

demonstrative showing of why and how BA's proposed plan is in the public interest, including the consumers' interest.

## **BACKGROUND**

BA filed its petition with the FCC on January 26, 1998.<sup>1</sup> The FCC subsequently issued a public notice requesting that any interested party could file comments by March 2, 1998 and reply comments by April 1, 1998. Subsequently, the FCC issued an order revising the periods for submission of comments and reply comments to April 6, 1998 and May 6, 1998 respectively. BA asserts that it filed this petition to ensure deployment of advanced telecommunications services consistent with Section 706(a) of the Act; to eliminate the choke points, lack of backbone speed, on the Internet which are creating barriers to infrastructure investments needed for a competitive market; and to avoid the consolidation of Internet backbone control in fewer and fewer hands so as preclude an oligopoly or worse from developing.<sup>2</sup>

BA postulates that current restrictions -- without mentioning Section 271 of the Act -- impede the offering of high-speed, and packet-switched data services necessary for the build out of the next generation Internet. BA submits that infrastructure investment will not occur unless participants are free from pricing, unbundling, and separation restrictions designed for voice calls. BA also asserts that investment in general, especially by BA, will be dampened unless BA is freed from the Act's

---

<sup>1</sup> BA filed its petition entitled "Petition of Bell Atlantic Corporation for Relief from Barriers To Deployment of Advanced Telecommunications Services" (hereinafter "petition"). The petition includes a Declaration of Professor Thomas W. Hazlet (hereinafter "Declaration"); a BA prepared White Paper Supporting Petition under Section 706 of the Communications Act (hereinafter "White Paper"); and Letters in Support of Bell Atlantic's Petition for Relief From Barriers to Deployment of Advanced Telecommunications Services (hereinafter "Letters").

<sup>2</sup> See, petition at p. 22; White Paper at p.28.



unbundling obligations. BA believes that insufficient backbone, high-capacity transport line and high speed routers exist on a national level to create the universally high-quality Internet access for all Americans contemplated by Congress. According to BA, even the most advanced systems today are still inadequate and are limited to just a few large cities, thereby precluding high-quality Internet access to most Americans.

As a result, the current congestion in the Internet backbone and other data-transmission networks limits the usefulness of services that BA already provides such as ISDN and xDSL and other services it may provide in the future. BA asserts further that its goal of high-speed and high-quality Internet access to all Americans, requires substantial investments and those substantial investments are fraught with risk. According to BA, such substantial investments is even more difficult when it has to compete as a new entrant against established firms in an industry undergoing consolidation. BA fears that the Internet backbone market is highly concentrated and becoming more so; if such trends continue, anti-competitive effects are likely, including higher prices for consumers. BA's solution is to spur investment which in turn intensifies or increases competition; but, BA postulates that such additional investment can and will not occur without removal of the impediments identified by BA.

## **DISCUSSION**

### **SECTION 271 OF THE ACT PRECLUDES THE COMMISSION FROM ACTING ON BELL ATLANTIC'S PETITION TO APPLY SECTION 706 OF THE ACT.**

Under the Act of 1996, Congress wanted to offer the RBOCs the carrot of participation in the long-distance market as an inducement for LECs to open the local exchange market to competition through the offering of access and interconnection to other carriers. Compliance by the

RBOC with the access and interconnection requirements of the Act were to be measured by application of the 14 point checklist of Section 271 of the Act. Until the checklist was met, RBOCs could not offer in-region interLATA services, except for certain incidental interlata services.

However, RBOCs could immediately offer out-of-region interLATA services as of February 8, 1996, the date the Act was signed. Out-of-region interLATA services are interLATA services originating outside of an RBOC's in-region states. At this time, there is no impediment to BA implementing its proffered plan including funding such investments in a high-speed and high-quality backbone infrastructure by building it now outside of its in-region service areas for use later once BA receives approval for in-region interLATA services. BA's concern with the increasing concentration in the control of the backbone and the trend toward an anti-competitive market can be solved by merely building its next generation network out-of-region. More importantly, BA can build an in-region system starting tomorrow as soon as it meets the 14 point checklist requirements of Section 271 of the Act. BA has the ability now to open its markets to meaningful local exchange competition while pursuing its goal as a new entrant in the backbone Internet market, it so earnestly covets.

As a practical manner, BA's petition seeks through the auspices of Section 706 of the Act to exempt itself from compliance with the 14 point checklist while obtaining limited in-region interLATA authority to build its interLATA Internet backbone infrastructure. The FCC is without authority to grants BA's petition because to do so would place the FCC in violation of the Section 271(d)(4) of the Act. The FCC is precluded from taking such action by Section 271(d)(4) of the Act.

Absent Congressional action, the FCC can not alter the Congressional scheme established under Section 271 of the Act. Furthermore, Section 706 of the Act only gives the FCC the

discretion, not the obligation, to exercise regulatory forbearance, but Section 10(d) of the Act expressly restricts the FCC exercise of statutory forbearance until Sections 251(c) and 271 are fully implemented. As noted above, the requirements of Section 271 are statutory requirements beyond the limited regulatory forbearance authority granted to the FCC under Section 706 of the Act. Contrary to BA's position, Section 706 cannot be used as a basis for otherwise changing the explicit provisions of Section 271 of the Act. BA's reliance upon its interpretation of Sections 10(c) and 706 is flawed. Regulatory forbearance is not statutory forbearance and under Section 10(d), statutory forbearance is not authorized until the requirements of Sections 251(c) and 271 are fully implemented.

Congress correctly envisioned that if access and interconnection were provided to other carriers, and if there was meaningful competition in the local exchange market, long-distance entry by the RBOCs in interLATA markets was warranted. Congress passed the Act to further those objectives. Access and interconnection were to be fostered by mandating interconnection in accordance with Sections 251 and 252 of the Act. This requires the local exchange carrier to provide interconnection through UNEs and through resale of services based upon wholesale prices so that a facilities based competitor as defined under Section 271(c)(1)(A) of the Act materializes. BA is effectively asking for a waiver of Section 271 requirements which is contrary to Congresses' intent as expressly set forth in the Act. It should be recalled that BA is the entrenched local exchange carrier, and it must not be freed from the requirements of the Act until it has opened its local exchange market to new entrants sufficiently to satisfy all Section 271 requirements. Once those requirements are fully met, BA may wish to refile the present petition with the FCC.

**BA HAS MADE NO SHOWING THAT THE REQUESTED RELIEF IS APPROPRIATE, WARRANTED, NECESSARY OR OTHERWISE IN THE PUBLIC INTEREST**

BA's petition is based on the premise that the Internet backbone market is becoming more concentrated with the increasing likelihood of anti-competitive effects down the road. BA's cure for this perceived problem is to request relief under Section 706 of the Act to remove impediments that in turn will enable BA to make substantial investments in Internet backbone infrastructure and prematurely offer in-region interLATA services. However, BA has made no showing that in-region backbone infrastructure competition does not exist or is inadequate in BA's in-region states. For the most part, BA is defining the Internet backbone market as a national and international market and relying upon ongoing consolidation in those national and international market to justify its premise. Furthermore, even assuming *arguendo* that actual in-region competition for Internet backbone did not exist, BA has provided no support why the grant of BA's petition would hasten meaningful competition for Americans outside of BA's in-region states in the national and international Internet markets. The premise of BA's petition is overly simplistic and flawed.

This flaw is even more apparent when one looks at the paucity of BA's proposed plan. BA has not proposed a detailed and specific plan identifying the level of investments, the scope and timing of the plan, the technical features of the plan, or the implementation schedule for the plan. By merely proposing a skeleton and not a thorough, complete and concrete plan with muscle, there is no opportunity for reasoned decision making, including any basis for finding the skeletal plan is in the public interest.

One is forced to rely upon BA's unsupported assertions while it seeks relief from so called established firms -- while at the same time BA has not satisfied Section 271 of the Act to open its

market to new entrants. There is no detailed and concrete plan but only a vague promise of a plan which BA asks the FCC to use as the basis for a finding that plan is necessary, warranted or otherwise in the public interest. BA's so-called plan at first glance looks and sounds attractive since it offers the prospect of more advanced telecommunications services to the public. That hope evaporates when scrutinized in the light of day due to the lack of a detailed and concrete plan, the lack of empirical evidence on the competitiveness of in-region Internet backbone infrastructure in BA's market, the lack of empirical evidence on how granting BA's requested relief will otherwise promote more access to advanced telecommunications services in the national and global arena of Internet backbone infrastructure, and the lack of detail which effectively precludes any rational and reasonable analyses of the plan and its affect, including whether this plan, if implemented could be used by RBOCs as another tool to delay local exchange competition. These glaring voids in BA's petition render it inherently unsuitable for serious consideration.

#### **INTRASTATE ADVANCED TELECOMMUNICATIONS SERVICES ARE SUBJECT TO STATE JURISDICTION AND LAWS**

BA completely ignores the role of the State commissions under applicable state law and the need for both the FCC and State commissions to review and authorize BA's proposal. BA's proposal involves intrastate services subject to exclusive state jurisdiction and authority coincident with federal jurisdiction and authority over interstate services. As a result, BA's proposal is subject to dual regulation based upon whether intrastate or interstate issues are involved.

BA's proposal clearly affects intrastate issues. BA states that its already provides ISDN and xDSL but the usefulness of these services are impacted by the current congestion on the Internet backbone. *See*, BA's petition at p. 2. ISDN and xDSL are local exchange services offered under

tariff to residential and business customers which are subject to state regulation and control. By way of example, the Ratepayer Advocate has contended in regulatory proceeding before New Jersey Board of Public Utilities (“Board”), that residential ISDN service is a “protected service” under New Jersey’s statutory scheme. The Board, a State commission, has yet to rule on this issue as a matter of State regulatory policy.

N.J.S.A. 48:2-21.18 permits alternate forms of utility regulation. In New Jersey, the local exchange telecommunications carriers can request an alternate form of regulation other than traditional rate base, rate of return regulation by submitting a plan to the Board and the Ratepayer Advocate. The Board is required to review the plan, and after notice and hearing, the Board may approve, reject, or modify the plan. Under N.J.S.A. 48:2-21.18(a), the Board must determine that the plan meets all the following requirements:

- (1) will ensure the affordability of protected telephone services;
- (2) will produce just and reasonable rates for telecommunications services;
- (3) will not unduly or unreasonably prejudice or disadvantage a customer class of providers of competitive services;
- (4) will reduce regulatory delay and costs;
- (5) is in the public interest;
- (6) will enhance economic development in the State while maintaining affordable rates;
- (7) contains a comprehensive program of service quality standards, with procedures for board monitoring and review; and
- (8) specifically identifies the benefits to be derived from the alternate form of regulation.

N.J.S.A. 48:2-21.19 requires that the Board not regulate, fix or prescribe the rates, tolls, charges, rate structure, terms and conditions of service, rate base, rate of return, and cost of the service, of competitive telecommunications service. “Competitive service” means any telecommunications service determined by the Board to be competitive prior to the effective date

of act or determined to be competitive pursuant to sections 4 or 5 of the act. N.J.S.A. 48:2-21.19(b) authorizes the Board after notice and hearing to determine whether a telecommunications service is a competitive service. The Board is directed to develop standards of competitive service which, at a minimum, shall include evidence of ease of market entry; presence of other competitors; and the availability of like or substitute services in the relevant geographic area.

The Board has a continuing duty to monitor competitive services and reclassify them as noncompetitive if conditions warrant. N.J.S.A. 48:2-21.19(e) requires the Board to implement safeguards and those safeguards are:

- (1) the local exchange telecommunications company shall unbundle each noncompetitive service which is incorporated in the competitive service and shall make all such noncompetitive services separately available to any customer under tariffed terms and conditions, including price, that are identical to those used by the local exchange telecommunications company in providing its competitive service;
- (2) the rate which a local exchange telecommunications company charges for a competitive service shall exceed the rates charged to others for any non-competitive services used by the local exchange telecommunications company to provide competitive service;
- (3) tariffs for competitive services filed with the board shall either be in the public records, or , if the board determines that the rates are proprietary, shall be filed under seal and made available under the terms of an appropriate protective agreement, such as those used in cases before the board; and
- (4) nothing in this act shall limit the authority of the board, pursuant to R.S. 48:3-1 to ensure that local exchange telecommunications companies do not make or impose unjust preferences, discriminations, or classifications for non-competitive services.

These statutory provisions have a consistent thread and that thread is the New Jersey Board must make a detailed analysis of the plan or competitive service prior to exercising the authority permitted by the applicable statutes. In order to perform such analysis, there must be in the first

instance a complete, comprehensive, concrete, and specific plan that is tailored to and complies with state statutory requirements in New Jersey. That analysis must in any case be made by the New Jersey Board of Public Utilities and not the FCC. BA did not address New Jersey's statutory requirements and their affect on its proposal and similarly, BA does not address statutory requirements of other states within BA's service area. BA's complete disregard of State interests in the Federal system of telecommunications regulation is but another example of its many failings and shortcomings, which compel its complete rejection by the FCC.

As a consequence, BA's cursory proposal is inadequate to permit the FCC under Section 706(a) of the Act or State commissions under specific state statutes to make any determination or assessment, let alone a determination that the proposal is warranted, necessary, or in the public interest. These limitation are readily apparent because BA (1) has not offered a specific and concrete plan, (2) has failed to address the state/federal jurisdictional issues and (3) does not identify and discuss the applicable State statutes and regulatory standards that must be met prior to federal or state review. Therefore, the FCC is in no position to consider BA's proposal at this time.

### **CONCLUSION**

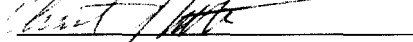
For the reasons set forth above, the Ratepayer Advocate respectfully asks that BA's petition be denied and dismissed.



Sincerely,

The State of New Jersey  
Division of the Ratepayer Advocate

Blossom A. Peretz  
Ratepayer Advocate

A handwritten signature in black ink, appearing to read "Chris White", is written over a horizontal line.

Christopher J. White  
Deputy Assistant Ratepayer Advocate  
31 Clinton Street, 11th Fl.  
Newark, New Jersey 07101  
(973) 648-7575